

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. MUHAMMAD

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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STATE OF NEBRASKA, APPELLEE,
V.
KHALID A. MUHAMMAD, APPELLANT.

Filed May 29, 2012. No. A-11-890.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge.
Affirmed in part, and in part reversed and remanded for further proceedings.

Khalid A. Muhammad, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Khalid A. Muhammad appeals an order of the district court for Sarpy County, Nebraska, in which the court denied Muhammad's application for postconviction relief and denied an evidentiary hearing on the issues raised in the application. We find that the court properly denied relief on the majority of Muhammad's assertions without an evidentiary hearing. However, we find that the court erred in dismissing, without an evidentiary hearing, Muhammad's assertions that his trial counsel was ineffective. As a result, we affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

This case arises out of Muhammad's 2007 conviction of receiving stolen property with a value in excess of \$1,500 and the finding that he is a habitual criminal. In case No. A-08-078, Muhammad appealed his conviction to this court. On direct appeal, Muhammad was represented by different counsel than during his trial. On appeal, Muhammad raised a number of issues,

including that his first trial counsel had been ineffective with respect to the waiver of Muhammad's right to a jury trial, as well as at a hearing on a motion to withdraw the waiver, and that his replacement trial counsel was ineffective in a variety of manners, including failing to conduct reasonable discovery and investigation, failing to call certain witnesses, and failing to appropriately challenge the failure of the prosecution to turn over certain evidence to the defense. In a memorandum opinion filed on March 24, 2009, we found no merit to Muhammad's assertions regarding the effectiveness of his initial trial counsel with respect to the waiver of a jury trial. With respect to Muhammad's assertions concerning the effectiveness of his replacement trial counsel, however, we found that the claims were such that the record presented on direct appeal was inadequate to allow review.

Muhammad filed an application for postconviction relief. In the application, Muhammad raised a variety of issues. Muhammad made assertions of prosecutorial misconduct, ineffective assistance of trial counsel, ineffectiveness of appellate counsel, cumulative trial error, and denial of due process.

The district court denied Muhammad's application for postconviction relief without granting an evidentiary hearing. The court held that Muhammad's assertions of prosecutorial misconduct could have been raised on direct appeal but were not and held that the claims were procedurally barred from postconviction relief. The court held that Muhammad had failed to allege sufficient facts concerning his assertions of ineffective assistance of trial counsel to merit an evidentiary hearing and held that the claims involved strategic decisions; further, the court held that Muhammad failed to allege sufficient facts to demonstrate that counsel had been ineffective. The court held that Muhammad failed to allege sufficient facts concerning his assertions of ineffective assistance of appellate counsel. The court found that Muhammad's remaining assertions, including cumulative error and due process assertions, were procedurally barred because they could have been raised on direct appeal and were not. This appeal followed. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

III. ASSIGNMENT OF ERROR

On appeal, Muhammad asserts, restated, that the district court erred in denying, without an evidentiary hearing, his application for postconviction relief.

IV. ANALYSIS

1. ASSERTIONS NOT PROPERLY PRESERVED OR PRESENTED

We initially note that although Muhammad's application for postconviction relief was approximately 45 pages in length, was accompanied by an affidavit in support that was another 50 pages in length, and included more than a dozen different assertions of grounds for postconviction relief, the issues properly before us in this appeal are very narrow. Muhammad, appearing pro se in this appeal, has presented argument to us concerning only the following assertions: prosecutorial misconduct by the State in failing to disclose evidence to the defense; ineffective assistance of trial counsel in failing to sufficiently investigate; ineffective assistance of trial counsel in failing to appropriately challenge the failure of the prosecution to turn over certain evidence to the defense; and ineffective assistance of appellate counsel. The remaining

assertions made in Muhammad's application for postconviction relief have not been argued in this appeal and are, therefore, not before us for consideration.

Muhammad's assertions of prosecutorial misconduct associated with his trial are also not properly before us. As noted above, Muhammad filed a direct appeal from his trial, conviction, and sentence. In that appeal, Muhammad could have raised to this court any available assertions of prosecutorial misconduct associated with his trial. He did not do so. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). As such, Muhammad's assertions of prosecutorial conduct are procedurally barred from further consideration.

2. ASSERTIONS REGARDING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Muhammad has assigned as error that the district court erred in denying his application for postconviction relief without granting an evidentiary hearing. He presented argument that the court erred in not granting a hearing on his assertions that his trial counsel was ineffective by not sufficiently investigating a variety of potential witnesses and by not appropriately challenging the prosecution's alleged failure to disclose evidence to the defense.

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Lee, supra*. When a movant makes such an allegation, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

In the present case, Muhammad raised on direct appeal that his trial counsel had been ineffective by not sufficiently investigating potential witnesses and by not appropriately challenging the prosecution's alleged failure to disclose evidence to the defense. We declined to address these assertions. In so doing, we specifically held that "these claims involve strategy and tactics, and the basis for such and the soundness thereof are not revealed by the record before us."

Muhammad raised these issues again in his application for postconviction relief. In that application, Muhammad alleged that he had spoken with his trial counsel about an alibi defense; that he had spoken with his trial counsel on specific dates in 2007 about additional information he had received from a witness, who subsequently testified at his trial; that his trial counsel had failed to investigate Muhammad's initial statements made during his arrest; that his trial counsel had failed to depose or otherwise investigate specifically named witnesses in regard to the alibi defense; and that his presentation of a meaningful defense was prejudiced by these failures. Muhammad also alleged that his trial counsel had been aware of additional evidence possessed by the State, including jailhouse admissions of a number of witnesses, and that his trial counsel had been aware that the prosecution had not disclosed evidence to the defense; that the undisclosed evidence would have been in favor of Muhammad's defense and would have been contrary to the prosecution's assertions that Muhammad had knowledge the property he had received was stolen; and that the undisclosed evidence would have indicated evidence of other potential suspects who had been involved instead of Muhammad. Muhammad also alleged that

the district court had ordered the prosecution to disclose evidence, that the State failed to do so, that his trial counsel failed to object or seek sanctions, and that his trial counsel's failure to act resulted in a failure to sufficiently provide adversarial testing of the State's case.

The district court held that these assertions of Muhammad did not require an evidentiary hearing. The court held that the claims were not procedurally barred because they were raised on direct appeal, and the court recognized that this court held on direct appeal that the record presented was insufficient to allow review of the claims. The court held, however, that Muhammad had alleged only allegations and had not alleged sufficient facts to demonstrate that his counsel had performed deficiently. The court held that "[e]ach claim that [Muhammad] asserts involves strategic decisions made by trial counsel" and concluded that "[n]o evidentiary hearing is required.

We disagree. As set forth above, Muhammad has asserted specific witnesses and evidence that he alleges were made known to his trial counsel, has asserted that his trial counsel failed to investigate, and has asserted that investigation would have revealed evidence to support his claims that he was unaware that the received property was stolen. Muhammad has asserted specific evidence was possessed by the State, was made known to his trial counsel, and was not obtained by his trial counsel, and he has asserted that the nondisclosed evidence would have assisted his defense by contradicting the State's evidence that Muhammad was involved in the theft of the property and by indicating that other potential suspects, instead of Muhammad, may have been involved. Muhammad has also asserted that his counsel did not object or seek sanctions despite knowing of the evidence and knowing that the prosecution had not disclosed it as ordered by the trial court.

The record right now is precisely the same as it was when these issues were raised to this court in Muhammad's direct appeal. There is no way to discern from the record whether Muhammad's assertions have validity or veracity. If Muhammad's assertions that his trial counsel was made aware of a variety of witnesses, was made aware of evidence those witnesses might have possessed to assist in his defense, and was made aware of evidence not properly disclosed by the State, there is no way to determine whether counsel did investigate or take actions to secure the evidence. If Muhammad's assertions that his trial counsel did not investigate or take actions to secure the evidence, there is no way to determine why or whether there were legitimate strategic reasons for so acting.

In short, Muhammad has alleged facts which, if true, would suggest that his trial counsel failed to pursue evidence that would have supported his defense and would have contradicted the State's assertions and evidence at trial. We held on Muhammad's direct appeal that the record was insufficient to allow us to determine whether there was, in fact, ineffective assistance of counsel related to these assertions. Nonetheless, the district court has concluded that the very same record is sufficient to conclude that Muhammad is not entitled to relief. An evidentiary hearing is necessary to make that determination, and we reverse the district court's conclusion to the contrary.

3. ASSERTION REGARDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Finally, Muhammad asserts that his appellate counsel provided ineffective assistance and that the district court erred in denying him relief on this claim without providing an evidentiary hearing. We agree with the district court that Muhammad did not allege facts to demonstrate that his appellate counsel was ineffective.

As noted, an evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). When a movant makes such an allegation, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

With respect to his claim that his appellate counsel was ineffective, Muhammad alleged in his application for postconviction relief that his appellate counsel was ineffective for "raising and arguing [sic] issues that lacked in merit." Muhammad has not indicated what issues his appellate counsel should have raised but failed to do, has not demonstrated that his appellate counsel raised any issues that counsel was aware lacked merit, or has not demonstrated that his appellate counsel's performance in any way resulted in prejudice to him. We agree with the district court that Muhammad failed to allege sufficient facts to demonstrate any entitlement to relief regarding his appellate counsel.

V. CONCLUSION

We affirm the district court's finding that Muhammad's claims of prosecutorial misconduct at his trial are procedurally barred and that his claims of ineffective assistance of appellate counsel were not supported by sufficient factual allegations. We reverse the court's finding that Muhammad's claims of ineffective assistance of trial counsel were appropriately resolved without an evidentiary hearing.

AFFIRMED IN PART, AND IN PART REVERSED AND
REMANDED FOR FURTHER PROCEEDINGS.